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BOARD OF APPEALS

BOARD OF APPEALS

Hearing # 11-05

**DECISION ON PETITION FOR DETERMINATION THAT PROPOSED
DWELLING AT 191 NAGOG HILL ROAD MAY BE CONSTRUCTED
PURSUANT TO G. L. c. 40A, § 6, FIRST PARAGRAPH**

The Acton Board of Appeals (the "Board") held a duly noticed public hearing on May 2, 2011, and continued this public hearing on May 16, 2011, with regard to the petition of Mark and Claire McCarthy for a determination that their proposed dwelling at 191 Nagog Hill Road may be constructed pursuant to G. L. c. 40A, first paragraph. Map D-4/Parcel 37.

Present at the hearing were Ken Kozik, Chairman; Marilyn Peterson, Member; Richard Fallon, Alternate Member; Scott Mutch, Zoning Enforcement Officer; Cheryl Frazier, Board Secretary (6/16); and Kim Gorman, interim secretary (6/2). Also present were the petitioners Mr. and Mrs. McCarthy, and their counsel, Louis Levine. Also present were abutters and interested parties.

The meeting was opened at 9:30 p.m. on May 2nd, after the hearing on #11-04. The Zoning Enforcement Officer's letter of March 11, 2011, had stated that the new proposed dwelling did not comply with Section 8.3.6 of the Zoning Bylaw, but that petitioners could seek a finding that it may be built pursuant to G. L. c. 40A, Section 6, first paragraph, which this petition seeks.

There was comment from the public in favor of the project. Board members decided that input from Town Counsel on the question of whether section 6 "trumps" the local bylaw would be helpful. The Board voted, with the consent of petitioners, to continue the public hearing to May 16, 2011.

On May 16, 2011, the hearing was resumed at 7:30 p.m. with the same parties as appeared on May 2nd, except for Cheryl Frazier instead of Kim Gorman. Ken Kozik read the analysis of Town Counsel, which was that the Board must decide under the "Section 6, first paragraph" analysis whether the changes in the proposed new house (e.g., increased footprint size) from the current house would increase the non-conforming nature of the structure; and if so, whether that would be a detriment to the neighborhood. Although counsel's letter did not explicitly state this, the implication was that if the Board found either that the changes did not increase the non-conforming nature of the structure, or if it did but this was not substantially more detrimental to the neighborhood, then the new house should be approved under "Section 6, first paragraph." Richard Fallon did not agree with that analysis: his view was that if there was an increase in non-conformity of the structure, then a Section 6, first paragraph overrule of the local bylaw did not apply; and that if no increase in nonconformity was found, there still had to be a finding that the changes were not substantially more detrimental to the neighborhood for approval under Section 6, first paragraph.

The ambiguity in determining whether there is increase in the non-conformity of the "structure" is as follows. This lot is nonconforming because it is a "hammerhead" lot where the access road "handle" is only 20 feet wide where the bylaw requires 50 feet. However, the proposed new house conforms to all setbacks required by law. It is clear, though, from the case of Bjorklund v. Zoning Board of Appeals of Norwell, 450 Mass. 357 (2008), that a non-conformity in "structure" can be based on, e.g., setback issues.

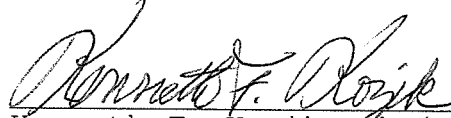
After the hearing was closed, the Board took two votes. In the first vote, the Board voted 2-1 (Ken Kozik dissenting) that the changes in the new structure did not increase the non-conformity of the structure. In the second vote, the Board voted 3-0 to approve the building permit for 191 Nagog Hill Road.

Conclusion

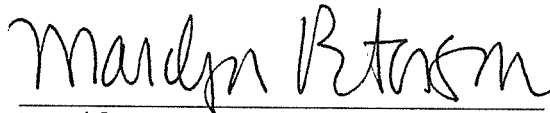
For the reasons stated above, the Board voted 3-0 to approve a building permit at 191 Nagog Hill Road under Massachusetts General Laws Chapter 40A, Section 6, first paragraph.

Any person aggrieved by this decision may appeal pursuant to Massachusetts General Laws Chapter 40A, Section 17, within 20 days after this decision is filed with the Acton Town Clerk.

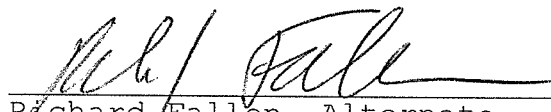
ACTON BOARD OF APPEALS



Kenneth F. Kozik, Chairman



Marilyn Peterson, Member



Richard Fallon, Alternate

Dated:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on June 3, 2011.



Cheryl Frazier, Secretary
Board of Appeals